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No. 82——

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTION PRESENTED

Does the Fifth Amendment to the United States Constitution require, in the absence of a *Miranda*-type warning, suppression of a probationer's noncustodial but incriminating admissions to his probation officer where the probationer is required by the conditions of his probation to meet with his probation officer as directed and to be truthful with her and the probation officer suspects that the probationer was involved in prior criminal activity?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents iii

Petition 1

Opinions Below 1

Statement of Jurisdictional Grounds 1

Constitutional Provisions 2

Statement of the Case 2

Reasons for Granting the Writ:

I. The Minnesota Supreme Court Has Decided An Important Question Of Federal Constitutional Law In A Way Which Conflicts With Applicable Decisions Of This Court And Has Thereby Extended The Meaning Of "Custodial Interrogation" And "Compelled Self-Incrimination" Beyond The Scope Of The Fifth Amendment. 8

II. The Minnesota Supreme Court Has Decided An Important Question Of Federal Constitutional Law Which Has Not Been, But Needs To Be, Decided By This Court To Resolve The Apparent Conflict Between The Decision Of The Minnesota Supreme Court And The Decisions Of Other State And Federal Appellate Courts. 14

Conclusion 15

APPENDIX INDEX

Appendix A: Opinion and Judgment of the Minnesota Supreme Court A-1

Appendix B: Memorandum and Order of the Hennepin County District Court B-1

Appendix C: Partial Transcript of Omnibus Hearing and Exhibits C-1
Appendix D: Partial Transcript of Motion to Dismiss Proceedings and Order Dismissing Proceedings D-1

TABLE OF AUTHORITIES

Cases:

Alspach v. State, — Ind. App. —, — N.E.2d — (Oct. 6, 1982) 15
Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976) 10
Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) 13
Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) 13
Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1977) 8, 11, 12
Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) 11
Grosso v. United States, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968) 11
Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) 13
Lynumn v. State of Illinois, 372 U.S. 28, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) 13
Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) 10
Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) 11
Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) 13
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 9, 10, 11, 12
Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) 9, 10, 12
Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) 10

People v. Alston, 79 Misc.2d 586, 360 N.Y.S.2d 768 (1974) 14-15
People v. Parker, 100 Misc.2d 800, 421 N.Y.S.2d 561 (1979) 14
People v. W., 24 N.Y.2d 732, 302 N.Y.S.2d 260, 249 N.E.2d 882 (1969) 15
People v. Yukl, 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172 (1969), *cert. denied*, 400 U.S. 857 (1970) 12
Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) 9, 13
Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) 13
State v. Johnson, 87 S.D. 43, 202 N.W.2d 132 (1972) 15
State v. Roberts, 14 Wash. App. 727, 544 P.2d 754 (1976) 14
United States v. Hall, 421 F.2d 540 (2d Cir. 1969) 12
United States v. Holmes, 594 F.2d 1167 (8th Cir. 1978) 14
United States v. Miller, 643 F.2d 713 (10th Cir. 1978) 14
United States v. Washington, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977) 9

Constitutional Provisions:

U.S. Const. amend. V 6, 8, 9, 11, 12, 13
U.S. Const. amend. XIV 6

Statutory Provisions:

28 U.S.C. § 1257 (3) (1976) 2
Minn. Stat. § 609.14 (1980) 12
Minn. Stat. § 609.185 (2) (1974) 6
Minn. Stat. § 609.255 (1980) 3
Minn. Stat. § 609.343 (1980) 3

IN THE

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No. 82——

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on September 21, 1982.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix A, is reported at 324 N.W.2d 340 (Minn. 1982). The opinion of the Hennepin County District Court, reproduced and attached hereto as Appendix B, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on September 21, 1982. This petition for a writ of

certiorari was filed within sixty days of entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1976).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On the morning of September 28, 1981, during the course of a meeting with his probation officer, Marshall Donald Murphy ("respondent") confessed to the 1974 rape and murder of a seventeen-year-old woman. In a pretrial certified appeal of the Hennepin County District Court's order ruling the confession admissible, the Minnesota Supreme Court held, solely on federal constitutional grounds, that the confession could not be used in the State's prosecution of respondent for murder in the first degree (App. A-10).[1] The circumstances leading to respondent's confession are as follows:

---

[1]Following the judgment of the Minnesota Supreme Court of which petitioner seeks review, the Hennepin County District Court dismissed respondent's indictment for lack of probable cause (App. D-3). The judgment of the Minnesota Supreme Court is therefore a final judgment within the meaning of 28 U.S.C. § 1257(3) (1976).

On August 19, 1980, respondent pled guilty to the crime of false imprisonment (Minn. Stat. § 609.255 (1980)) in a prosecution for criminal sexual conduct in the second degree (Minn. Stat. § 609.343 (1980)).[1] Following this plea, the Hennepin County District Court sentenced respondent to a stayed prison term of sixteen months and a probation term of three years (App. C-31). The conditions of respondent's probation required him, *inter alia*, to participate in a treatment program, to report to his probation officer as directed, and to be truthful with her in all matters (App. C-32). The terms of respondent's probation also provided that failure to comply with these conditions "[could] cause [respondent] to be returned to the Court for further hearing or commitment." (App. C-33). On September 22, 1980, the District Court appointed Mara Widseth ("Widseth"), a probation officer with the Hennepin County Department of Court Services, to supervise respondent's probation (App. C-4).

Respondent is a twenty-nine-year-old high school graduate (App. C-25, C-29). He attended vocational school and later served in the military (App. C-29). He is familiar with the criminal justice system (App. C-29). Following his sentencing, respondent participated in a treatment program for sexual offenders and met with his probation officer once a month to discuss treatment, employment, and personal relationships (App. C-5-6).

On July 14, 1981, upon learning that respondent was no longer in treatment, Widseth wrote respondent a letter asking him to contact her immediately (App. C-7). The letter stated that failure to do so would result in an immediate re-

[1]Respondent was originally charged with criminal sexual conduct in the second degree. He pled guilty to false imprisonment, a lesser included offense, pursuant to the terms of a plea agreement.

quest for a warrant (App. C-35). Respondent contacted Widseth by telephone and agreed to meet with her in her office on July 21, 1981 (App. C-8).

At this meeting, respondent indicated that he did not want to continue treatment (App. C-14). Widseth acquiesced and told respondent that she would not seek to have his probation revoked on that ground alone because he was employed and seemed to be doing well in other areas (App. C-14). Respondent and Widseth met again in her office on September 11, 1981, without incident (App. C-8, C-14).

On September 22, 1981, Widseth learned from a counselor in respondent's treatment program that during the course of treatment respondent had admitted the commission of a rape and murder in 1974 and had also indicated that he was not arrested because of the lack of evidence (App. C-15). After discussing the matter with her supervisor, Widseth decided that she would have to relay the information she had received from respondent's counselor to the police (App. C-16). She then wrote respondent a letter asking him to contact her in order to discuss a treatment plan for the remainder of his probation (App. C-15). The letter contained no threats (App. C-36).

Upon receiving Widseth's letter, respondent contacted her by phone and made an appointment to meet with her in her office on September 28, 1981. At no time prior to the September 28 meeting did Widseth contact the police or the prosecutor's office (App. C-20). Throughout the course of this meeting the door to Widseth's office was unlocked and respondent was free to leave at any time (App. C-19-20). He was in fact allowed to leave at the conclusion of the meeting even though he had confessed to a crime (App. C-19).

Widseth began the meeting by telling respondent the substance of the information she had received from his counselor (App. C-16). She then proceeded to stress the need for further treatment in light of the behavioral relationship between the incident leading to respondent's false imprisonment conviction and the rape and murder to which respondent had confessed during treatment (App. C-9). Upon learning that his counselor had disclosed confidential information to his probation officer, respondent became angry (App. C-9) and stated that "he felt like calling a lawyer" (App. C-21, C-26). Widseth told respondent that "he would have to deal with [that] outside the office" (App. C-16). She then reiterated the need to discuss the behavioral relationship between the incidents leading to the false imprisonment conviction and the 1974 rape and murder, stating that such relationship indicated the need for further treatment (App. C-16).

Respondent denied committing the crime of false imprisonment and stated that at the time of the rape and murder he had been using drugs quite heavily (App. C-9). He also stated that he was no longer using drugs (App. C-9). Widseth "confronted" respondent with his claim of innocence of the false imprisonment charge by reviewing with him a police report and a presentence investigation regarding the offense, as well as specific incidents reported by the victim and respondent's own statements concerning the crime (App. C-17-18). Without prodding by Widseth, respondent then proceeded to talk about the rape and murder in detail (App. C-18).

At the conclusion of the meeting, Widseth told respondent that she had a duty to relay the information he had given her to the police and encouraged him to turn himself

in (App. C-18, C-28). Respondent said he understood that Widseth was obligated to go to the police (App. C-22) and asked her for time to think about whether or not to turn himself in (App. C-18). Widseth acquiesced (App. C-18). Respondent began crying and told Widseth that he had committed the "ultimate sin" (App. C-11). He also told Widseth that she "must really care about him" because she gave him time to think instead of turning him in to the police right away (App. C-18-19, C-21). Respondent took a few minutes to compose himself and left the office (App. C-19).

On September 30, 1981, respondent called Widseth and told her that he had consulted an attorney and had been advised not to turn himself in (App. C-28). On October 2, 1981, Widseth procured the issuance of an arrest and detention warrant against respondent from the judge who had sentenced him (App. C-14). On October 29, 1981, the Hennepin County Grand Jury returned an indictment charging respondent with murder in the first degree (Minn. Stat. § 609.185 (2) (1974)).

At a pretrial hearing held before the Hennepin County District Court respondent moved to suppress his confession on the ground that it was obtained in violation of his Fifth and Fourteenth Amendment rights. The trial court ruled that the confession was admissible, finding that respondent was not "in custody" or otherwise deprived of his freedom of action in any significant way at the time of the confession (App. B-11-12), and that his statements were neither "compelled" nor "involuntary" despite the absence of a *Miranda*-type warning (App. B-13-14). On appeal the Minnesota Supreme Court reversed the order of the trial court and remanded the matter for further proceedings, holding as follows:

> Because of the compulsory nature of the meeting, because [respondent] was under court order to respond truthfully to his [probation officer's] questions, and because the [probation officer] had substantial reason to believe that [respondent's] answers were likely to be incriminating we conclude that, as a matter of federal constitutional law, any failure on [respondent's] part to claim the [Fifth Amendment] privilege [against compelled self-incrimination] when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that as a matter of due process, the [probation officer] should have warned [respondent] of his privilege against self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of [respondent's] confession at his trial.

324 N.W.2d at 344 (Minn. 1982) (App. A-10). Following the judgment of the Minnesota Supreme Court the Hennepin County District Court dismissed respondent's indictment, staying the dismissal pending appeal to this Court (App. D-3-4).

REASONS FOR GRANTING THE WRIT

I.

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND HAS THEREBY EXTENDED THE MEANING OF "CUSTODIAL INTERROGATION" AND "COMPELLED SELF-INCRIMINATION" BEYOND THE SCOPE OF THE FIFTH AMENDMENT.

The question presented herein is whether a probationer suspected of involvement in criminal activity must be advised of his Fifth Amendment privilege against compelled self-incrimination prior to a noncustodial interview with his probation officer. The Minnesota Supreme Court has held that a probationer must be so advised where the conditions of his probation require him to meet with his probation officer as directed and to be truthful with her, and the probation officer has reason to believe that the probationer's answers to her questions are likely to be incriminating. Implicit in the Court's holding is that the probationary relationship, like police custodial interrogation, contains inherently coercive pressures which work to undermine the probationer's will to resist and his ability to make a free and rational choice. The logical corollary of the Court's holding is that, in the absence of a *Miranda*-type warning, all noncustodial admissions by a probationer to his probation officer are barred as inherently compelled even where, as in this case, the probationer is not in custody or otherwise deprived of his "free choice to admit, to deny, or to refuse to answer," *Garner v. United States*, 424 U.S. 648, 657 (1977), and

the totality of the circumstances reflects that the probationer's free will was not overborne, *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

In holding that a probationer must be advised of his Fifth Amendment privilege under the circumstances of this case, the Minnesota Supreme Court has adopted an unduly expansive interpretation of the self-incrimination provision of the Fifth Amendment. The Fifth Amendment does not prohibit a person from incriminating himself. Nor does it prohibit another from persuading him to do so. Moreover, under controlling decisions of this Court, the Fifth Amendment does not require the giving of a warning appropriate to custodial interrogation in a noncustodial setting. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Miranda v. Arizona*, 384 U.S. 436 (1966). Rather, it requires merely that a person not be *compelled* to incriminate himself. Absent some genuine compulsion to testify, therefore, the Fifth Amendment does not automatically proscribe self-incrimination. *See United States v. Washington*, 431 U.S. 181, 186 (1977).

To be sure, the probationary relationship may exert pressures on probationers generally and, for many probationers, may engender an atmosphere conducive to truth telling. Nevertheless, the probationary status does not of itself place a probationer under legal compulsion to incriminate himself. Absent some indicia of involuntariness, therefore, a probationer's noncustodial incriminating admissions are not, as the Minnesota Supreme Court held, automatically proscribed by the Fifth Amendment.

The major thrust of the Minnesota Supreme Court's opinion is that the principle of *Miranda* should be extended to the present case even though respondent was not in "custody or otherwise deprived of his freedom of action in

any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Minnesota Supreme Court appears to have reasoned that the conditions of respondent's probation and the probation officer's belief that respondent's statements were likely to be incriminating, made the probation officer's questions the functional equivalent of custodial interrogation.

In *Miranda*, the Court reasoned that the coercive pressures inherent in custodial surroundings trigger the need for special procedural safeguards to protect the privilege against self-incrimination. In subsequent decisions, this Court has repeatedly emphasized that it is the custodial nature of the surroundings, and not the "focus" of the government's investigation or the strength of the government's suspicions, which gives rise to the need for adherence to the requirements of *Miranda*. *See Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Orozco v. Texas*, 394 U.S. 324, 326 (1969); *Mathis v. United States*, 391 U.S. 1, 4 (1968). In *Mathiason* this Court further indicated that "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.' " 429 U.S. at 495. Thus, because respondent was neither under arrest nor deprived of his freedom of movement in any way, the Minnesota Supreme Court's ruling constitutes an unwarranted extension of *Miranda*. Moreover, under *Mathiason*, the court's implicit finding that the meeting between respondent and his probation officer took place in a coercive environment is not sufficient to trigger the requirement of a *Miranda*-type warning.

The Minnesota Supreme Court's decision is also in conflict with the general rule that, in the absence of some factor depriving an individual of his "free choice to admit, to deny, or to refuse to answer," the privilege against compelled self incrimination must be timely claimed or it is waived. *See Garner v. United States,* 424 U.S. 648, 657 (1976). This Court has held that where an individual under compulsion to testify makes incriminating disclosures instead of claiming his privilege against self-incrimination, the government is not deemed to have compelled the incriminating disclosures absent a showing that the individual was deprived of his freedom to claim the privilege. *Id.* An individual is deprived of that freedom only when subjected to the pressures inherent in custodial interrogation, *Miranda v. Arizona,* 384 U.S. 436 (1966), or when faced with the choice between self-incrimination and the threat of legal sanctions or job forfeiture, *see Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Garrity v. New Jersey,* 385 U.S. 493 (1967).

The Minnesota Supreme Court now holds, in total disregard of applicable decisions of this Court, that respondent was deprived of his freedom to claim his Fifth Amendment privilege even though he was neither in custody nor required to choose between self-incrimination and the threat of legal sanctions. The Minnesota Supreme Court's decision is premised on the erroneous assumption that probation, like custodial interrogation, contains inherently coercive pressures which deprive a probationer of his freedom to invoke his constitutional right to remain silent and render involuntary an otherwise voluntarly statement.

The Minnesota Supreme Court overlooks the fact that probation is a far cry from the sort of "incommunicado

interrogation . . . in a police-dominated atmosphere" which formed the basis of the Court's holding in *Miranda*. It further overlooks the fact that the conditions of probation do no require probationers to incriminate themselves and therefore do not present them with the inherently coercive choice between self-incrimination and probation revocation. Had respondent invoked his Fifth Amendment privilege instead of making incriminating disclosures, he would have incurred no legal sanctions. *See* Minn. Stat. § 609.14 (1980). Thus, respondent cannot be said to have been denied the free choice to remain silent since a valid and timely claim of the privilege would have been available to him as a complete defense at any subsequent probation revocation hearing. *See Garner v. United States,* 424 U.S. at 665. That respondent thought his probation might be revoked if he invoked his right to remain silent is irrelevant, because a determination of voluntariness or compulsion requires the application of an objective test. *See Oregon v. Mathiason,* 429 U.S. 492 (1977); *United States v. Hall,* 421 F.2d 540 (2d Cir. 1969); *People v. Yukl,* 25 N.Y. 2d 585, 256 N.E.2d 172, 307 N.Y.S. 2d 857 (1969), *cert. denied,* 400 U.S. 851 (1970).

Finally, an assessment of the totality of the circumstances clearly demonstrates that respondent's confession was the product of his free and rational choice. Respondent is a twenty-nine-year-old high school graduate with significant experience in the criminal justice system. The interview during which he confessed was brief and was conducted in familiar surroundings. Respondent was neither threatened nor physically abused. He was made no promises in exchange for his confession and was allowed to leave the probation officer's office at the conclusion of the interview. In

finding respondent's confession involuntary the Minnesota Supreme Court disregarded the traditional criteria of involuntariness and relied instead on factors which do not even approximate the circumstances this Court has recognized in the past as rendering confessions involuntary. *See Brown v. Mississippi*, 297 U.S. 278 (1936) (use of overt physical force); *Spano v. New York*, 360 U.S. 315 (1959) (use of deceptive promises and practices); *Rogers v. Richmond*, 365 U.S. 534 (1961) (threat to have petitioner's wife taken into custody); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (prolonged isolation of fourteen-year-old boy from family and friends); *Lynumn v. State of Illinois*, 372 U.S. 528 (1963) (threat to have petitioner's children taken away from her); *Haynes v. Washington*, 373 U.S. 503 (1963) (suspect refused permission to call wife or lawyer until he confessed; *Mincey v. Arizona*, 437 U.S. 385 (1978) (hospital interrogation while petitioner was barely conscious and weakened by pain and shock).

Whatever the desirable practice may be, the Minnesota Supreme Court's requirement that a probationer be advised of his Fifth Amendment privilege against compelled self-incrimination prior to a noncustodial interview with his probation officer is far removed from the governmental obligation under the Fifth Amendment to guard against compulsion. Moreover, the Court's requirement raises a host of problems not only in the administration of probation as a viable sentencing alternative but also in the administration of justice in general. Carried to its logical conclusion, the decision of the Minnesota Supreme Court requires suppression of all noncustodial admissions to any government agent in the absence of a *Miranda*-type warning and thereby transmutes the policy of the Fifth Amend-

ment against compulsion into a general policy against incriminating admissions.

II.

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT NEEDS TO BE, DECIDED BY THIS COURT TO RESOLVE THE APPARENT CONFLICT BETWEEN THE DECISION OF THE MINNESOTA SUPREME COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS.

The exact factual circumstances giving rise to this case have not been duplicated in other reported opinions. Nevertheless, these factual circumstances resemble those confronted by other state and federal appellate courts and may be expected to recur in the future.

The courts which have confronted factual circumstances similar to those presented herein have uniformly held that a probationer's noncustodial statements to his probation officer may be used against him in subsequent criminal proceedings despite the absence of *Miranda* warnings. *See United States v. Miller*, 643 F.2d 713 (10th Cir. 1978) (parolee interviewed by his parole officer at home); *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979) (probationer's statements connected him to crime he later committed); *People v. Parker*, 100 Misc.2d 800, 421 N.Y.S.2d 561 (1979) (probationer warned that anything he might say would be used against him in revocation proceeding); *State v. Roberts*, 14 Wash. App. 727, 544 P.2d 754 (1976) (incriminating statements made during telephone conversation initiated by parolee); *People v. Alston*, 79 Misc.2d 586, 360

N.Y.S.2d 768 (1974) (incriminating statements made during regularly scheduled visit); *State v. Johnson*, 87 S.D. 43, 202 N.W.2d 132 (1972) (probationer interviewed by probation officer at home). *People v. W.*, 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S. 2d 260 (1969) (probationer came to probation department voluntarily seeking help for companion). *See also Alspach v. State*, — Ind. App. —, — N.E.2d — (Oct. 6, 1982).

Because of the apparent conflict between the Minnesota Supreme Court's decision and the decisions of other state and federal appellate courts and because of the burgeoning uncertainties that surround the area of probation officer interrogation of noncustodial probationers, it is important for this Court to review the decision of the Minnesota Supreme Court.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully prays that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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November 1982.

APPENDIX

Appendix A

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL DONALD MURPHY.

Defendant.

Scott, J.
Dissenting:
Peterson,
Yetka, JJ.

Endorsed
Filed August 31, 1982
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Where probation agent interrogating defendant probationer had substantial reason to believe that answers to her questions would incriminate defendant and where defendant as a condition of probation was required to meet with her and to respond to her questions truthfully, agent should, as a matter of due process, have warned defendant of his privilege against compelled self-incrimination before questioning him and agent's failure to do so bars use of resulting confession against defendant at trial.

Reversed and remanded for further proceedings.

Heard, considered and decided by the court en banc.

OPINION

SCOTT, Justice.

Pursuant to Minn. R. Crim. P. 29.02, subd. 3 (1980). the district court has certified to this court as important and doubtful the question of the admissibility of a confession made by defendant, who is being prosecuted on a charge of first-degree murder, to his probation agent. The issues raised by the appeal relate to whether the confession was obtained in violation of defendant's privilege against compelled self-incrimination, which is contained in U.S. Const. amend. V.

In 1974 defendant was twice questioned by Minneapolis Police in connection with the murder of a 17-year-old Minneapolis girl but no charges were filed against him.

In 1980 defendant pleaded guilty to a reduced charge of false imprisonment in a prosecution for criminal sexual conduct in the second degree in connection with a different incident. The trial court sentenced defendant to a stayed prison term of 16 months, with 3 years probation. As conditions of probation, defendant was ordered to participate in a treatment program and to report to his probation agent as directed by her. He was also ordered to be truthful with her in all matters.

Thereafter, defendant met with the agent at her office approximately once a month.

In July 1981 the agent received information that defendant was no longer participating in the treatment program. The agent wrote defendant a letter telling him to contact her and set up a meeting. The letter added that "Failure to do so will result in an immediate request for a warrant." That meeting was held in late July, with the

agent telling defendant at the end that notwithstanding his lack of participation in the program, she was not going to seek revocation of his probation because he was employed and was doing well in other areas.

Defendant next met with the agent on September 11, 1981, without incident. He was next scheduled to arrange a meeting with the agent in mid-October.

On September 22, the agent learned from a counselor at the treatment program that during treatment defendant had said that he had once committed a rape/murder and that the police did not arrest him because of the lack of evidence.

Two days later the agent met with her supervisor and they decided that she had to report this information to the police. She told her supervisor that she would tell defendant of their decision. That same day she wrote defendant a letter stating, in full, "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." The agent did not contact police before meeting with defendant but knew in advance that she would tell the police about any incriminating statements defendant made.

The meeting was held on the morning of September 28 in the agent's office. The agent apparently opened the meeting by telling defendant about the information which she had received from the counselor and then said that she now felt that defendant needed treatment. Defendant became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney.

The agent apparently replied that he would have to deal

with that outside the office; that her main concern was to talk to him about the relationship of the prior crime and the one of which he was convicted and about his need for treatment under the circumstances.

The agent testified that her door was unlocked and that defendant was perfectly free to leave at any time without talking with her. Defendant testified that he did not feel free to leave because that would have been a violation of his probation. He also testified that he did not know he had a right to refuse to answer her questions or to consult an attorney, and that, because she put the entire conversation in the context of what the treatment plan for him should be, it did not occur to him that she would go to the police with what he said. He testified further that he had had two probation officers before her and that neither of them had ever gone to the police with anything he said.

The session therefore continued, with the agent first talking with defendant about the crime of which he was convicted, then about the rape/murder. When defendant claimed that he really was not guilty of the crime of which he was convicted, the agent confronted him with the police reports and so on and challenged his claim of innocence. When she talked with him about the rape/murder, he confessed.

After defendant had made his confession, the agent informed him for the first time that she would have to tell the police what he had said. She also urged defendant to turn himself in.

On September 30, after talking with an attorney, defendant told the agent that he had been advised not to turn himself in to the police. On October 2, a warrant was issued for defendant's arrest. He was subsequently in-

dicted for first-degree murder with testimony given by the agent. The district court denied a motion to suppress.

The issue before us is whether the confession to the agent was obtained in violation of any of defendant's rights. We hold that it was.

The United States Constitution, Amendment V, protects one against being "compelled in any criminal case to be a witness against himself."

Generally, the government may not use a person's incriminating statements in any subsequent criminal case in which he is a defendant if the statements were legally compelled by the government notwithstanding his claim of the privilege against compelled self-incrimination. *Garner v. United States*, 424 U.S. 648, 653 (1976).

Although the privilege is not self-executing but generally must be claimed, the United States Supreme Court has isolated certain situations in which the failure to claim the privilege at the time of the compulsion will not bar the defendant's later reliance on it at trial.

One such situation is custodial interrogation of a suspect. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that not even a voluntary confession obtained during custodial interrogation of a suspect by police could be used against him in a later criminal prosecution unless the prosecution showed that the suspect was given a *Miranda* warning and knowingly and intelligently waived the privilege. The reason for the exception in such cases was stated in *Garner v. United States*, 424 U.S. 648, 657 (1976), as follows:

> It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent.

> [Citation omitted]. At the same time, the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures. Because of the danger that custodial interrogation posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege.

In another line of cases the Court held that persons required to file returns in connection with the federal occupational and excise taxes on gambling could exercise the privilege simply by failing to file such a return and did not have to submit a claim of privilege in lieu of the return in order to claim the privilege because such a submission by itself would have been incriminating. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968). As stated in *Garner*, "The basis for the holdings in *Marchetti* and *Grosso* was that the occupational and excise taxes on gambling required disclosures only of gamblers, the great majority of whom were likely to incriminate themselves by responding" and therefore, as in the case of custodial interrogation of suspects, "Any compulsion to disclose was likely to compel self-incrimination." 424 U.S. at 660.

A third situation in which the Court has held that the defendant can rely on the privilege at trial notwithstanding his failure to claim it at the time he made his incriminating statements is exemplified by *Garrity v. New Jersey*,

385 U.S. 493 (1967). In that case policemen who were being investigated for corruption were told that they could claim the privilege but that they would be discharged if they did. The Court held that their incriminating disclosures could not later be used against them notwithstanding their failure to claim the privilege when they were being investigated because the penalty of discharge for the concededly valid exercise of the privilege foreclosed a free choice to remain silent.

Finally, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that it was error to allow a phychiatrist to testify at the penalty phase of a capital felony trial on the issue of future dangerousness because the psychiatrist's opinion was based on incriminating statements that defendant had made during a court-ordered psychiatric examination to determine defendant's competency for trial, at which defendant had not been given a *Miranda* warning. Although the psychiatrist was not a policeman, he was not acting solely in defendant's interests when he examined defendant and the examination was in fact a phase of the adversary system. Since the defendant did not intiate the evaluation or attempt to use the psychiatric evidence, the defendant should not have been compelled to submit to the examination without a warning to him that his statements could be used against him.

A majority of courts in other jurisdictions which have considered the admissibility of confessions made by a released offender to a probation or parole officer while in custody and absent *Miranda* warnings have held such confessions admissible in parole or probation revocation her-

ings, but inadmissible in a criminal prosecution.[1] This rule was more succinctly stated by the United States District Court for the Western District of Pennsylvania as follows.

> [W]hile statements made to a probation or parole officer without the *Miranda* warnings being given are properly admitted in a parole revocation hearing where various types of hearsay may be used to inform the court as to the parole violation, nevertheless when these statements are used to prove an entirely separate offense against the defendant *and he is in custody and under the compulsion of discussing matters with his parole or probation officer*, *Miranda* warnings must be given before such testimony can be admitted in evidence in the trial involving the separate offense.

United States v. Steele, 419 F. Supp. 1385, 1386-87 (W.D. Pa. 1976). A rationale underlying the suppression of statements given a parole officer without *Miranda* warnings is that released offenders are under heavy psychological pressure to answer inquiries made by their supervising officers. This pressure is recognized as sufficient to render the interrogation inherently coercive.[2]

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[1] *See People v. Diesing*, 67 Ill. App. 3d 109, 23 Ill. Dec. 781, 384 N.E. 2d 575, 577 (1978); *State ex rel. Struzik v. Dept. of Health & Soc. Serv.* 77 Wis. 2d 216, 252 N.W.2d 660, 662 (1977); *People v. Hardenbrook*, 68 Mich. App. 640, 243 N.W.2d 705, 708 (1976); *State v. Magby*, 113 Ariz. 345, 554 P.2d 1272, 1276 (1976); *State v. Roberts*, 14 Wash. App. 727, 544 P.2d 754, 756-57 (1976); *United States v. Deaton*, 468 F.2d 541, 544 (5th Cir. 1972); *State v. Williams*, 486 S.W.2d 468, 473 (Mo. 1972); *State v. Lekas*, 201 Kan. 579, 442 P.2d 11, 15 (1968). *See also United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980).

[2] *See, e.g., State v. Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396, 400 (1974), *cert. granted*, 420 U.S. 1003, *remanded*, 425 U.S. 257, *on remand*, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976).

These cases, *inter alia*, illustrate the exceptions to the rule that a person ordinarily must claim the privilege at the time he is being compelled to incriminate himself if he later wants to be able to prevent the use of the incriminating statements in any criminal prosecution of him. Justice Powell summarized the rule recently in *Roberts v. United States*, 445 U.S. 552, 559 (1980), stating that "[a]t least when the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." He then summarized *Garner* by saying, in a footnote, that the rule is subject to exception "when some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent " 445 U.S. at 560, n.6.

We need not decide whether defendant in fact claimed the privilege in this case because we conclude that an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege.

Although defendant was not in custody in the usual sense, his freedom of action was considerably restricted at the time of the questioning. In *Estelle v. Smith*, 451 U.S. 454 (1981), the psychiatric examination occurred in jail so that the questioning was custodial in the usual sense. However, some of the language used by Chief Justice Burger in the Court's opinion suggests that the result might have been the same even if the examination had not been conducted while the defendant was in jail because defendant was under legal compulsion, in the form of a court order, to submit to the examination.

In this case the examination occurred in the agent's office. Defendant was there at her request but, unlike the

defendant in *Oregon v. Mathiason*, 429 U.S. 492 (1977), who voluntarily went to the station to talk with the police at their request. defendant was there under legal compulsion since it had been made clear to him in the past that it was a condition of his probation that he meet with the agent when requested. It was also a condition of defendant's probation that he respond truthfully to the agent's questions. Failure to meet with her or to be truthful with her could have constituted a violation of the terms of probation.

Also, the questioning was not just general questioning but questioning by a government agent who had "substantial reason to believe that the requested disclosures [were] likely to be incriminating," *Roberts v. United States*, 445 U.S. 552, 559 (1980), a fact bearing strongly on whether defendant's failure at that time to claim the privilege bars his reliance on the privilege as a ground for suppression at trial.

Because of the compulsory nature of the meeting, because defendant was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that defendant's answers were likely to be incriminating, we conclude that. as a matter of federal constitutional law, any failure on defendant's part to claim the privilege when he was questioned does not bar his later reliance on the privilege in seeking suppression of his confession. Stated differently, we conclude that, as a matter of due process, the agent should have warned defendant of his privilege against compelled self-incrimination before she questioned him and that her failure to do so, when she had already decided to report his answers to the police, bars use of defendant's confession at this trial

When the enormity of this decision is contemplated, we wonder whether there may be some other solution than the exclusion of otherwise trustworthy evidence. John Henry Wigmore Professor of Law Emeritus Fred E. Inbau, in his article *Over-Reaction—The Mischief of Miranda v. Arizona*, 73 J. Crim. L. & C. 797 (1982), writes that:

> There is no better refutation of *Miranda* philosophy than the opinion of Chief Justice Joseph Weintraub of the New Jersey Supreme Court in a 1968 case, in which he stated:
>
> "There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. Voluntary confessions accord with high moral values, and as to the culprit who reveals his guilty unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be 'compelled' to give evidence against himself"

Id. at 809. At this writing, however, we believe that *Weeks v. United States*, 232 U.S. 383 (1914), and its

progeny constitutionally demand the result arrived at in this opinion

Reserved and remanded for further proceedings.

PETERSON, Justice (dissenting).

The essence of the majority decision is that the interrogation of the defendant/probationer by his probation officer, who failed to inform him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), violated due process and mandates suppression of the resulting confession. The most recent case to consider this issue supports a contrary conclusion. In *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982), a probation officer received information concerning possible violations of probation by a probationer. The officer went to the probationer's home and questioned the probationer about the alleged violations. The probationer, after unsuccessfully requesting an attorney, gave incriminating responses. The probationer later sought to suppress these responses, contending that the interrogation was custodial and thus the admission of the statements violated *Miranda*. The court characterized this contention as "without merit" and stated:

> The duty "to report" and to answer questions posed by a probation officer is an integral obligation of the probationary status. While a probationer is not deprived completely of his Fifth Amendment rights and may assert them, he runs the risk that his refusal to answer will lead to a charge of violation of probation. Any other rule would make a mockery of the supervision aspect of probation.

Id. at 390. While *Rea* is not foursquare with the facts in this case, I see little difference between imprisoning a

defendant for violation of parole and imprisoning him for a new crime, based in either case on evidence obtained from his probation officer. There was no more coercion of defendant Murphy in this case than there was of the defendant in *Reo*, and hence, I cannot see that defendant Murphy was "compelled" to give evidence against himself. In this regard, I concur with the views of Chief Justice Weintraub contained in the last paragraph of the majority opinion.

YETKA, Justice (dissenting).

I respectfully dissent. I do not believe the privilege against self-incrimination was intended to apply to the situation presented here. The defendant is a parolee who would be serving a prison sentence but for that fact. One of the conditions of his parole is to meet periodically with a probation agent. The probation officer's function is to work towards rehabilitating the parolee while protecting the public interest. *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980). To do this job, the agent must be aware of all of the parolee's problems, both past and present. It is entirely reasonable for the agent to ask a parolee if he has had prior problems with the law. If the agent in this case had gone first to the police before talking with the defendant, she would have destroyed her credibility and severely impaired her ability to assist the defendant.

We have held in *State v. Earnest*, 293 N.W.2d 365 (Minn. 1980), that a parolee has a duty to cooperate with his agent and that an agent can search a parolee's apartment without a search warrant if the agent has probable cause to believe the parolee has violated the terms of parole. As we noted there, because of the special rela-

tionship between a probation officer and his client, the law relating to probationary searches cannot be strictly governed by automatic reference to ordinary search and seizure rules. *Id.* at 368; *see Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975) (parole rather than probation situation). Thus, I would hold this is not an ordinary custodial situation to which the privilege should apply. Even if it is held to be custodial, I would hold that this parolee's situation is an exception to the rule and that the privilege does not apply.

STATE OF MINNESOTA, SUPREME COURT

STATE OF MINNESOTA,

82-271 vs.

MARSHALL DONALD MURPHY,

Defendant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the issue before this court as to whether the confession to the agent was obtained in violation of any of the defendant's rights is answered in the affirmative and the matter is remanded to the district court for further proceedings in accordance with the opinion, a certified copy of which is attached hereto.

Dated and Signed September 21, 1982.

BY THE COURT.

Attest:
JOHN McCARTHY, Clerk.

STATE OF MINNESOTA
SS.
SUPREME COURT

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul September 21, 1982.

JOHN McCARTHY, Clerk.
By /s/ Wayne Tschimperle, Deputy.

Appendix B

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL DONALD MURPHY,

Defendant.

OMNIBUS II & MEMORANDUM

D.C. No. 79037
C.A. No. 81-2515

The above-entitled matter came duly on before the Honorable Jonathan Lebedoff, one of the Judges of the above-named Court, upon defendant's motions to suppress the testimony of his probation officer, Mara Widseth, and personnel from Alpha House regarding any of defendant's statements; to dismiss the grand jury indictment; to suppress evidence seized from defendant; to suppress any evidence taken as a result of identification procedures; and upon the State's motion in limine to acquire testimony from the Alpha House employees.

The State appeared by Robb Lynn, Esq., Assistant Hennepin County Attorney, and the defendant appeared by Mark Wernick. Esq.

Upon all the files, records, testimony at the Omnibus hearing and memoranda of counsel,

IT IS ORDERED THAT:

1. Defendant's motion to exclude the testimony of his probation officer is denied.

2. Defendant's motion to dismiss the grand jury indictment is denied.

3. Defendant's motion to suppress evidence seized from defendant as a result of identification procedures is denied.

4. The State's motion to require testimony from Alpha House employees is denied.

Let the attached memorandum be made a part of this order.

DATED: February 9, 1982.

BY THE COURT:

/s/ Jonathan Lebedoff
Judge of District Court

MEMORANDUM

This prosecution is by indictment for Murder in the First Degree of Sherrie Cole on or about October 29, 1974. Defendant was questioned by police on at least two occasions soon after the body of Sherrie Cole was found on November 21, 1974, but no charges were brought, apparently because the evidence was insufficient.

On August 19, 1980, defendant pled guilty before Judge Durda to the charge of False Imprisonment in Hennepin County District Court File No. 75330. He was sentenced on September 22, 1980, to serve sixteen months at Stillwater, execution stayed three years, with three

years probation. Mara Widseth, of the Hennepin County Department of Court Services, was appointed to supervise this probation.

Among the conditions of probation were the normal ones, including the requirement to be truthful to the probation officer and to report to the probation officer as directed. Additionally, defendant was required to pursue treatment at Alpha House, a treatment program designed to deal with sexual offenders containing both in-patient and out-patient components.

Shortly after being placed on probation, the defendant began treatment at Alpha House. On or about July 3, 1981, the probation officer received information from Alpha House to the effect that the defendant was not pursuing treatment. On July 14, 1981, the probation officer wrote the defendant a letter requesting that he contact her. The letter stated, "Failure to do so will result in an immediate request for a warrant" (Def. Ex. 3). In response to that letter, the defendant scheduled a meeting with the probation officer at her office. The meeting occurred on July 21, 1981. At that meeting, the probation officer told the defendant that she would not seek to revoke his probation for leaving treatment because he was apparently doing well in other areas. However, the probation officer still retained the authority to have the defendant pursue treatment. On October 2, 1981, the sentencing Court, at the request of the probation officer, issued an Arrest and Detention Warrant against the defendant which alleged that "although the defendant pursued treatment at Alpha House, he was terminated for failure to actively work on a problem area and to comply with the terms of the group" (Testimony of Mara Widseth).

On September 11, 1981, the defendant met again with his probation officer at her office. This meeting was one of several monthly meetings which the defendant arranged by calling the probation officer for an appointment. After this meeting, the defendant was under no obligation to arrange another meeting with his probation officer until mid-October, 1981.

On September 22, 1981, the probation officer was told by a counselor at Alpha House that during treatment the defendant said that he had committed a rape/murder and that the police did not arrest him because of a lack of evidence.

On September 24, 1981, the probation officer met with her supervisor in order to discuss what should be done with the new information. They decided that the probation officer must report the information to the police. The probation officer told her supervisor that she would inform the defendant of their decision. On that same day, the probation officer wrote the defendant a letter which said, "To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment." (Def. Ex. 4.)

At 10 a.m. on September 28, 1981, in response to the probation officer's letter, the defendant met with her at her office. At the time of the meeting, the defendant had not slept for 24 hours, having worked from 10 p.m. to 6 a.m. the previous evening. During this meeting, the probation officer "confronted" the defendant with the information she had received from Alpha House. She also told the defendant that although she had previously allowed him to continue on probation without treatment, she now felt strongly that he needed further treatment. The defen-

dant became angry because he thought that everything he said in treatment was confidential.

Both the probation officer and defendant testified that he spoke of obtaining an attorney. Her understanding was that the defendant was interested in an attorney for a civil action against Alpha House for the breach of confidentiality; he maintains he was interested in protecting his rights relative to criminal prosecution. In any case, she told him he would have to contact an attorney outside her office and then proceeded with the interview.

The thrust of defendant's statement was that the false imprisonment and rape/murder were unrelated. He maintained that he was innocent of the false imprisonment charge and explained that the rape/murder occurred at a time when he had just returned from the army, had broken up with his girlfriend, and was using drugs heavily. He gave the details of the rape/murder.

After the defendant had talked about the murder, the probation officer told him that she was obligated to take her information to the police. By this time, the defendant had started to cry. The probation officer encouraged the defendant to turn himself in to the police. The defendant asked for time to think about it, and the probation officer gave him "permission" to do so. He then left her office.

That evening, the defendant made several attempts to contact a lawyer. On September 30, 1981, after having talked with a lawyer, the defendant called his probation officer and told her that he was advised not to turn himself in to the police. The record is not clear as to whether or not the probation officer had already contacted the police. In any event, on October 2, 1981, a warrant for Murder

in the Second Degree was issued against the defendant, and he was subsequently indicted for Murder in the First Degree

Defendant asserts three independent but interrelated grounds for excluding testimony regarding his confession to the probation officer. First, he argues that the setting was custodial and that therefore the *Miranda* warnings were a prerequisite for admissibility. Alternatively he argues that even if the full *Miranda* warnings were not required he should at least have been informed that his statements could be used against him in a criminal trial and that he had the right to speak to a lawyer. Finally, he asserts that the statements were compelled within the meaning of the Fifth Amendment and consequently inadmissible regardless of any requirements for warnings. Defendant does not directly claim that his Sixth Amendment right to counsel was denied, but rather that his request for counsel was an invocation of the privilege against self-incrimination

In the opinion of this Court, the setting of the interview was not custodial and the *Miranda* warnings were not required. While undoubtedly it would have been the better practice to have given some kind of warning, we do not feel such a warning was an absolute prerequisite to finding the statement to be voluntary. We believe that the totality of the surrounding circumstances indicate (sic) that this statement was in fact voluntarily given and consequently, testimony concerning it is admissible.

I. MIRANDA

Miranda v. State of Arizona, 384 U.S. 436 (1966), establishes a presumption that statements resulting from

an in-custody interrogation by law enforcement agents are involuntary unless preceded by very specific procedural safeguards. As subsequent cases make clear, custody is an essential element to trigger those procedural safeguards. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711. 50 L.Ed 2d 714 (1977), *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed 2d 1 (1976). Citing the above two cases, the Minnesota Supreme Court has stated:

> "The test for determing the need for a *Miranda* warning is not whether the interrogation has coercive aspects to it or whether the investigation has focused on the person being questioned, but whether the person being questioned is in custody or is deprived of his freedom of action in any significant way."

State v. Palm, 299 N.W.2d 740 (1980).

Defendant argues that he was here deprived of his freedom of action in a significant way, citing the facts that he was under an obligation to meet with his probation officer, that he was obliged to tell her the truth and cooperate, and that she already had grounds to revoke his probation (his failure to continue the treatment). His failure to cooperate would have constituted additional grounds to revoke his probation.

In support of his position that these elements deprived him of his freedom of action in a significant way, defendant cites the Court to *State v. Fields*, 621 P. 2d 651 (Ore. App. 1980), where a probationer was required to come to his probation officer's office to fill out his monthly report which he was late in filling out and which would have been grounds for revocation. While the report was being filled out the probation officer, knowing the proba-

tioner was suspected of being involved in a car theft, called a policemen who came to question the probationer. Prior to beginning the questioning, the police officer told the probationer that he was not under arrest and that he didn't have to answer any questions. He none-the-less confessed. The Court held that for the purposes of *Miranda*, he was in custody and the lack of the warnings made the confession involuntary. In coming to this conclusion, the Court analyzed the factors in the probation officer/probationer relationship that defendant urges us to rely on here. On rehearing, the Court distinguished this case from *Mathiason v. Oregon*, supra. where a burglary suspect responded to a state trooper's message to call him, then arranged to meet him at the trooper's office and there gave a confession, on the basis that *Mathiason* went voluntarily where *Fields* was required to come to the probation officer's office or face the potential consequence of having his probation revoked. *State v. Fields*, 624 P.2d 655 (Ore. App. 1981).

Admittedly, *Fields* presents many similarities to the fact situation involved in this case. A significant distinction, as defendant recognizes, is that in *Fields* the interrogator was in fact a policeman. He points out, however, that the focus of the Court was on the relationship with the probation officer and not that with the police officer.

It is apparent, however, from cases cited to the Court by the State, that courts do not universally arrive at the same conclusion the Oregon appellate court did. In *United States v. Holmes*, 594 F. 2d 1167 (8th Cir. 1979), a conversation with a probation officer regarding black powder weapons which occurred when the defendant was not in custody or charged with a crime was considered admis-

sible without *Miranda* warnings in his subsequent trial for allegedly receiving firearms because he was neither in custody nor charged at the time of the conversation. *United States v. Miller*, 643 F. 2d 715 (1981) rejected the notion that the parole officer-parolee relationship was such that the parolee was in a custodial interrogation situation when interviewed in his home. *People v. Petit*, 97 Ill. App. 693, 423 N.E. 2d 513 (1981) similarly found statements to a probation officer at an informal meeting (where it took place is not clear) admissible to show that he was a sexually dangerous person. *In re Ricahrd T.*, 79 Cal. App. 3d 382, 144 Cal. Rptr. 856 (1978), a minor actively on parole to the Youth Authority was picked up by his parole officer and taken to the parole officer's office after the parole officer had gone to the minor's home and found a gun on the couch. While driving to the office and once there the parole officer questioned the minor regarding his involvement with the gun and several specific incidents. The gun was determined to have been stolen and the minor was charged with receiving stolen property. One distinguishing feature is that the Court felt, somewhat contrary to the evidence, that at the time of the initial investigation the parole officer was only investigating a parole violation and not a new crime. However, in *People v. Alston*, 79 Misc. 2d 586, 360 N.Y.S. 2d 768 (1974), the probation officer did know of a pending homicide investigation and questioned defendant when receiving Methadone. His statements were admissible.

People v. Parker, 100 Misc. 2d 800, 421 N.Y.S. 2d 561 (1979), also presented facts similar to the instant case. Defendant notified his parole officer he had been arrested. These charges were subsequently dismissed. On the

day defendant told his parole officer of the dismissal, the officer asked defendant to come see him. During the interview defendant made a highly incriminating statement. The parole officer notified police; testified before the grand jury; and defendant was subsequently reindicted. The issue before the Court was whether admissions made to a parole officer can be introduced into evidence where no *Miranda* warning was given. The Court answered in the affirmative, stating:

> "Miranda established the classic definition of custodial interrogation as 'questioning initiated by a law enforcement official after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'
>
> "The defense has argued that this visit to the parole officer was in fact a custodial setting in that the defendant was under heavy 'psychological' pressure to respond to questions put to him by his parole officer as that officer has the power to detain and arrest a parolee.
>
> "This court cannot agree with defendant's contention; the test laid down in *People v. Yukl*, 25 N.Y. 2d 585, 307 N.Y.S. 2d 857, 256 N.E. 2d 172 for determining whether a defendant is in custody 'is not what the defendant thought, but rather what a reasonable man, innocent of any crime would have thought had he been in defendant's position.'
>
> "In this particular case we have a fact pattern whereby a parolee initiated routine contact with a parole officer following an arrest and prior to a sub-

> sequent court appearance, and this parolee was advised at that time 'to come in and see' his parole officer following the next court appearance. This does not convey the element of 'the incommunicado police dominated atmosphere of custodial interrogation and overbearing of the subject's will' necessary for determining custodial interrogation established by *People v. W.*, supra; but rather the freedom to come and go after each visit to the parole officer would characterize the questioning as routine and an integral part of the parole process. These monthly visits took place from April, 1978 until at least November, 1978, and after each visit the defendant was free to leave."

These cases provide ample support for our conclusion that defendant should not be deemed in custody here. They recognize that there is indeed an element of compulsion in the probation officer/probationer relationship, that the probationer's appearance at a probation office is not entirely voluntary and that there are consequences which could follow from being dishonest with the probation officer.

Here defendant was required to meet with his probation officer in her office. He, however, was responsible for setting up the time. The office was a place where he had been at least twelve times during the previous year. He came in on his own; he left on his own. While we do not ascribe any particular significance to it, we note that the door to the office was open at all times during the interview. We cannot turn this into the custodial setting the procedural safeguards of *Miranda* was (sic) aimed at. In each of the four interviews there the defendant was subject

to several hours of police interrogation in police interrogation rooms following arrest. *Mathiason*, supra, makes clear the limits of what is to be considered custodial. We do not think the distinction the Oregon Court makes in *Fields* is sufficient to turn this into a custodial setting or one which significantly deprives the defendant of his freedom.

The issue of voluntariness apart from *Miranda* warnings raises many of the factors already discussed but does present a closer question.

An inculpatory statement is only admissible if it was voluntarily given. *See, State v. Biron*, 266 Minn. 272, 123 N.W. 2d 392 (1963). When a claim of involuntariness is made, the court must look at the totality of the circumstances to determine whether "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." *Beckwith v. United States*, 425 U.S. 341, 348 (1976), citing *Rogers v. Richmond*, 365 U.S 534, 544 (1961). The totality of relevant circumstances include age, maturity, intelligence, education, experience, and the ability to comprehend. *See, State v. Hogan*, 297 Minn. 430, 212 N.W. 2d 664 (1973). A confession may not be extracted by any sort of threat or violence or obtained by direct or implied promises. *Malloy v. Hogan*, 378 U.S. 1 (1964). The court must review the facts surrounding the confession, determine how defendant reacted to these external facts, and decide the legal significance of how defendant reacted. *See, State v. Orscanin*, 283 N.W. 2d 897, 899 (Minn. 1979), *cert. denied* 100 S.Ct. 464 [(1979)].

Phrased as defendant puts it, the issue is whether or not he was compelled to make the statement. In *United States v. Washington*, 431 U.S. 181 (1977) the court said:

> "*Garner* holds that the Self-Incrimination Clause is violated only when the Government compels disclosures which it knows will incriminate the declarant. That is, only when it intentionally places the individual under 'the compulsion to incriminate, not merely compulsion to make unprivileged disclosures." '

In *Washington*, grand jury testimony was found admissible in spite of a failure to warn that the information could be used to indict the witness.

Here there is no question that the probation officer knew that the information she was requesting would be incriminating, and further that she was intending to turn the information over to the police. We have no problems assuming that she was a government agent. The question remains, however, whether or not the statement was "compelled" or, alternatively voluntary (sic). We think not.

As we have already noted, defendant was responsible for setting the time of the appointment. He chose to make it at a time when he apparently had not slept for twenty-four hours. Very likely he was tired, but that tiredness was of his own doing. He could have set up a time when he would have been rested. Again, he was meeting in a place familiar to him and with a person whom he had met a number of times. He was 29 years old, a high school graduate, and has made no claim of any mental deficiences. He had been previously convicted of other felonies and was familiar with the criminal justice system. When confronted by the probation officer, he was angry at his confidences being disclosed but talked with her freely. He now claims that he asserted a right to talk to an attorney, and whatever his real intent may have been, we

are persuaded by the probation officer's testimony that he did not express that desire in any context other than a civil suit for the breach of confidentiality. Against these factors is the fact that a condition of his probation was that he be honest with his probation officer, and that he was there ostensibly to discuss further treatment in regard to his current probation. Failure to follow through with either of these could have resulted in revocation of the probation and potential imprisonment. These factors were present in all of the cases previously discussed concerning statements to probation or parole officers and in all but one case the courts found the confessions admissible. Considering this and all of the other surrounding circumstances we believe this confession to have been voluntary.

In *Orscanin*, supra, the Minnesota Supreme Court found statements made after six days in a six-by-nine or ten feet lockup to have been voluntary. The defendant was eighteen years old, facing his first contact with adult court and had been led by his probation officer to believe the matter would be handled in juvenile court if "he cleared things up." Even with the full *Miranda* warnings the factors there appear to us to be much more compelling than those here.

As we noted earlier, defendant's argument that he was entitled to some kind of warning regarding the use of his confession represents what we would consider to be the better practice, but the lack of such warnings do (sic) not violate the voluntariness of the confession given here.

MOTION TO DISMISS INDICTMENT

Defendant's motion to dismiss the grand jury indictment is based on the premise that the testimony of Mara

Widseth is inadmissible. Having determined that it is admissible, it appears to the Court that the evidence admissible at trial is sufficient to establish probable cause to believe that Murder in the First Degree was committed. The motion to dismiss is accordingly denied.

STATE'S MOTION IN LIMINE

The State and defendant have stipulated that the provisions of 42 CFR Chapter 1 are applicable to the Alpha House programs The regulations have been promulgated pursuant to 21 U.S.C. §1175 and 42 U.S.C. §4582 providing for confidentiality of patient records in federally assisted drug and alcohol rehabilitation programs. We do not believe a treatment program under these regulations can be segmented, as the State would have us do, into drug and alcohol components, to which the regulations apply, and sexual therapy, to which they don't 42 CFR §2.61-2.67 make (sic) provisions for court ordered disclosures and in §2.65 specifically deals with investigation and prosecution of patients. The State argues that this should not be governed by §2.63 which limits disclosures under the sub part to objective data such as the facts or dates of enrollment. We find no support for this reading, particularly in light of §2.63-1, which we quote in full:

> "In the three-year period subsequent to the original enactment of 21 U.S.C. 1175, not a single occasion was reported to the Special Action Office for Drug Abuse Prevention on which an attempt was made to secure a (b) (2) (C) order authorizing the disclosure of a confidential communication by a patient to a counsellor or other member of the staff of a treat-

> ment program. In all of the comments and testimony received on the draft regulations published August 22, 1974, there was nothing to suggest any circumstances under which a court order authorizing such a disclosure would be either desirable or appropriate. Yet the mere possibility that such an order might be issued is to some a source of anxiety which impairs the effectiveness of treatment. Such an ongoing negative effect clearly outweighs the remote theoretical possibility that some perculiar circumstance might arise in which judicial authorization for such a disclosure might be sought. Accordingly, the limitation imposed by §2.63 on the scope of (b)(2)(C) orders to preclude that possibility, and hence to eliminate its adverse influence on treatment services, appears to be a proper exercise of rulemaking power."

Even were we not persuaded that this section precludes the testimony the State seeks, we would disallow it nonetheless under §2.65(c) (3) and (4). The information the State seeks is essentially the same as will be testified to by Mara Widseth, which the Court has determined to be admissible. Further, we believe the forced disclosure of what was revealed during group and individual therapy would significantly limit the future efficacy of such programs.

Finally, we note that while this ruling makes it unnecessary to address the State law issue, it appears that the Minnesota Legislature in Minn. Stat. 254A.09 and 595.02, Subd. 7, has provided confidentiality protections which would preclude this testimony even if the federal statute was not applicable.

ORDER

D.C. No. 79037
C.A. No. 81-2515

WHEREAS, the question of law posed by Defendant's Motion to suppress statements made by Defendant to his probation officer are both important and doubtful; and

WHEREAS, Defendant has requested that the Court report this case so far as may be necessary to present those questions of law and certify the report to the Supreme Court;

IT IS HEREBY ORDERED, that Defendant's Motion to suppress statements made by Defendant to his probation officer be certified to the Supreme Court, pursuant to Rule 29.02, Subd. 4, Rules of Criminal Procedure.

IT IS FURTHER ORDERED, that the February 16, 1982, trial date be stricken and that all proceedings in this case be stayed until the decision of the Supreme Court.

BY THE COURT

JONATHAN LEBEDOFF
Judge of District Court

Dated: February ——, 1982.

Appendix C

STATE OF MINNESOTA,

Plaintiff,

vs.

MARSHALL MURPHY,

Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS

DC FILE NO. 79037

CA FILE NO. 81-2515

The above-entitled matter came duly on for hearing before the Honorable Johathan Lebedoff, a judge of the above-named court, at the Hennepin County Government Center, Minneapolis Minnesota, on the 12th day of January, 1982.

Appearances:

Robert Lynn, Esq., Assistant County Attorney, appeared as counsel for and on behalf of the plaintiff.

Mark Wernick, Esq., appeared as counsel for and on behalf of the defendant.

Defendant was present.

Claudette Ask was present as court reporter.

[2] (January 12, 1982)

Mr. Lynn: Your Honor, this is State of Minnesota versus Marshall Donald Murphy, District Court File 79037 County Attorney's File 81-2515. We are present in chambers, Mark Wernick appearing on behalf of the Defendant Marshall Murphy, Robert Lynn on behalf of the State of Minnesota. Mr. Jerry Chaplin is here from Alpha House.

Mr. Zalasky: Jeff Zalasky.

Mr. Lynn: We are here in advance of taking testimony at the omnibus hearing, and trial is scheduled, your honor, I believe it's February 16.

The Court: Did you want to place something on the record, Mr. Wernick?

Mr. Wernick: Yes, Your Honor. My understanding is we are now about to go out in the courtroom and take testimony with regard to a statement made by Marshall Murphy to his probation officer, Mara Widseth. In order to cross-examine Ms. Widseth about that statement, it is going to be necessary for me to ask her questions as to why she was interviewing Mr. Murphy at that time. That will involve answers by Ms. Widseth which reflect conversations that she had with a psychologist at Alpha House which is where Mr. Murphy had been in treatment. And I want the record to be very clear that it is necessary I ask those questions to establish my client's Fifth Amendment rights, and I in no way intend to waive any privileges that he has by eliciting that testimony.

The Court: Okay. We will note that statement on the record, and now we can go out and take the testimony.

As long as we are on the record, the record may further reflect that we are going to take the testimony now, as I understand it, of two witnesses for the state, a police officer and Ms. Widseth. The defense may call the defendant as well. There's going to be no other testimony taken at this time, and it's the thought of all that a stipulation as to the other facts can be obtained and furnished to the court forthwith which would obviate the necessity of any additional testimony. If that proves unsuccessful, nothing in this hearing would foreclose an additional hearing be-

ing held for the sole purpose of taking additional testimony consistent with the issues raised in this hearing. Okay? All right. Let's go out.

Mr. Wernick: One more thing for the record. I had also asked the court, since this hearing will involve statements made by Mr. Murphy which may or may not be admissible at the trial, I have asked this court to conduct this hearing in chambers noting there are at least two members of the press in the courtroom.

The Court: All right. There was a timely motion. [4] Does the state have a position on that?

Mr. Lynn: Generally the state is opposed to closing any sort of hearing. I think if we warn these people involved, they understand their duties of free press and fair trial standards, and I think we can impose upon them not to publish this until the court's ruled.

The Court: Well, I don't know I can count on that. I am going to note on the record out in the courtroom a request was made that this be held in chambers. I am not, but I am just going to note that that was declined, and I hope that they use the same judgment that they have used.

[5] Mara Widseth

Mr. Lynn: Your Honor, the next witness the state would call at this time is Mara Widseth.

Mara Widseth, called as a witness, being duly sworn, testified as follows:

The Clerk: Please state your full name.

The Witness: Mara Widseth.

Direct Examination

By Mr. Lynn:

Q. Ms. Widseth, what's your occupation? A. Probation officer, Hennepin County.

Q. How long have you been a probation officer in Hennepin County? A. Since November of 1979.

Q. Do you know a man named Marshall Murphy?

A. Yes, I do.

Q. Is the man you know as Marshall Murphy seated to my right in this courtroom? A. Yes, he is.

Q. How is it that you know Marshall Murphy?

A. Marshall was placed on probation to me in 1980.

Q. I ask you to speak a little louder. I am having trouble hearing you. A. Marshall was placed on probation to me in 1980.

Q. Do you recall the date in 1980 that he was placed [6] on probation? A. The exact date was September 22, 1980.

Q. And for what offense was he on probation?

A. False imprisonment.

Q. Who was the judge involved? A. Judge Durda.

Q. For what period of time was he placed on probation? A. Three years.

Q. As his probation officer, are you familiar with the terms and conditions of his probation? A. Yes, I am.

Q. Can you tell us what those terms and conditions were? A. Yes. There are standard conditions of probation. Would you like those, also?

Q. I believe the court and counsel are familiar with those. A. Okay. The only special condition of probation that was ordered was that Marshall pursue treatment at Alpha House

Q. Did he in fact pursue treatment at Alpha House?

A. Yes, he did.

Q. Does your file indicate when it was he began that treatment at Alpha House? [7] A. It was—I don't—I do not have the exact date. It was sometime in between September 22 when he was originally placed on probation and October 15 when we next met.

Q. Now, you indicated you met with Marshall Murphy then on October 15, correct? A. Correct.

Q. At the time that he was placed on probation to you. did you go over with Marshall Murphy the conditions of probation, the normal ones and the specific ones?

A. Yes, I did.

Q. Is it customary in your experience with your probationers to meet with them from time to time? A. Yes, it is.

Q. What's your own practice in that regard? A. I am involved in the supervision of clients who are on probation, monitoring behavior, referring to community services or any outside needed services, and monitoring that, also.

Q. In regards to Marshall Murphy, did you make attempts to meet with him on a regular basis? A. Yes.

Q. Did you have a particular schedule that you would meet? A. Yes. Primarily it was once a month.

Q. Where did those meetings normally take place?

[8] A. Normally in the office, in my office.

Q. That's located in this building? A. Yes.

Q. How were those meetings set up? A. Marshall was required to contact me once a month by telephone and set up an appointment with me.

Q. Did he do that from the beginning in September or October of 1980? A. Yes, with a couple of exceptions he did.

Q. Did that continue on through the time that he was involved in the Alpha House program? A. Pardon me?

Q. Would those meetings continue during the time that he was involved in the Alpha House program?

A. Yes.

Q. At these periodic meetings at your office, without the details, what normally would you discuss? A. We would discuss any changes that had occurred in his situation, his life situation, since I had last met with him, his progress at Alpha House. He discussed his employment quite often, many problems that arose with that, or with personal relationships.

Q. Between September of 1980 and September of 1981, that one year period of time, do you know how many times—how many such meetings you had with Marshall Murphy? [9] A. Twelve. Twelve in-office meetings.

Q. All right. So my mathematics tells me that averages out to one a month? A. Yes.

Q. Besides the in-office meetings, what other contacts did you have with him in that period of time? A. Telephone contacts and field contacts which were at Alpha House when we met, also with Tim O'Brien, the director of Alpha House.

Q. As a part of your job as Marshall Murphy's probation officer, were you monitoring his progress at Alpha House? A. Yes.

Mr. Lynn: Your Honor, may we approach the bench for a moment?

(Discussion off the record.)

By Mr. Lynn:

Q. Ms. Widseth, at some time did you become aware that Marshall Murphy was no longer involved in the treatment program at Alpha House? A. Yes, I did.

Q. When did that happen? A. I received a telephone call from—

Mr. Wernick. Excuse me, Your Honor, may we approach the bench?

[10] The Court: Yes.

(Discussion off the record.)

The Court; The direct response to the question isn't how you found out or by whom—I think the question is when you found out. Can you tell us that?

The Witness: Yes. I believe it's July 31, 1981. Either July 31 or July 30. I can't read my writing very clearly.

By Mr. Lynn:

Q. I take it you learned at that point that Marshall Murphy was no longer involved in the program at Alpha House? A. That's correct.

Q. What action did you take, then, having learned that? Perhaps I can rephrase it. Was any sort of order for arrest and detention or probation violation brought about? A. No, there was not. I have a letter, a copy of a letter, written to Marshall on July 14 requesting him to contact me immediately regarding the absence of his participation in Alpha House. I probably found out about his non-participation in Alpha House prior to July 31 since the letter was dated July 14.

Q. You wrote him on the 14th of July and asked him to contact you about this situation? A. Right.

Q. Did he contact you? [11] A. Yes, he did.

Q. When was the next contact? A. He telephoned me—I don't have the telephone—the date of the telephone conversation recorded, but we did meet in the office July 21. 1981. The day is July 3, 1981, that I found out about his lack of participation in Alpha House.

Q. All right. So then you met with him on July 21, is that correct? A. That's correct.

Q. At that point was any action taken regarding his probationary status? A. No, there was not.

Q. After that meeting or at any time after July the 21st, did he return back to Alpha House or begin again at that program? A. No, he did not.

Q. Now, I'd like to ask you about September the 28th of 1981, move ahead a few months. Did you meet with Marshall Murphy that day? A. Yes, I did.

Q. Let me ask you, between the meeting you indicated you had July 21, '81, to discuss Alpha House and your meeting of September 28, were there any other meetings with Marshall Murphy? [12] A. Yes, there were.

Q. How many? A. One.

Q. When was that? A. September 11, 1981.

Q. All right. Let me focus if we can on the meeting of the 28th of 1981. Where did that take place?

A. That was at my office, also.

Q. Who was there when you met with Marshall Murphy? A. Just Marshall and myself.

Q. What did you discuss with Marshall Murphy in that meeting the 28th of September, '81? A. I discussed

with him information that I had received regarding his admission to a rape and murder which occurred several years prior to that.

Q. I take it you confronted Marshall with that information. A. Yes, I did.

Q. How did he respond to that? A. He became very angry that that information had been provided to me.

Q. Did he say anything further about the incident itself? A. Yes, he did.

Q. What did he tell you about that? [13] A. Marshall claimed that the false imprisonment incident which he was on probation for and the past rape and murder were unrelated as he did not commit the false imprisonment offense, and at the time that the rape and murder had occurred he was using drugs quite heavily. He said that they were not related because he was no longer using drugs, and he had been straight for quite some time.

Q. Why were the two of you discussing the relationship between those two events? A. I had expressed concerns to Marshall that with the new information that I had received that his actions in the false imprisonment offense and actions in the rape and murder that he had admitted to were strongly related behaviorally and that that needed to be dealt with continued treatment.

Q. Was that relationship important to you as his probation officer on the false imprisonment charge?

A. Yes, it was.

Q. Did you discuss with Marshall Murphy on September 28 the rape-murder incident that happened some several years prior? A. Yes.

Q. Do you recall if you can what you asked him and

what he told you about that? A. Yes. Marshall said that after he was released from [14] the service he was in an exclusive relationship with a woman; that he discovered that this woman was seeing another man at the time that they were supposedly in the exclusive relationship. He said that the other boyfriend also found out that she was seeing Marshall at the same time. He apparently beat the woman up—

Q. When you say he, who do you mean? A. The other boyfriend. The girlfriend came to Marshall's house, and he described her as being beat up very badly and bleeding, and he said that he was so disgusted with her behavior up to that point that he did not allow her into his house. He said his roommate came home shortly afterward, saw the girl sitting on—sitting in front of the house, and came in the house, asked Marshall why he didn't let her in, and Marshall said he didn't want anything to do with her.

The roomate apparently, according to Marshall, let the girl in, and there wasn't much else said about that particular incident. Marshall then went on to say that as time passed he became more despondent over the breakup of the relationship, and it was affecting him emotionally. He was using drugs quite heavily. He said that one night he went to a bar with one of his ex-girlfriend's best friends named Sherrie—I am sorry, not that he went to the bar with her but that he left the bar with Sherrie and another woman named Pam.

[15] Q. Do you recall what he told you about what happened after they left the bar? A. He said that they were walking home, the three of them, Pam, Sherrie and Marshall; that Pam eventually left the two of them and

walked her own way. Marshall continued to walk with Sherrie. He said that he attempted to make out with her but that she was not interested, and she continued to resist. He said that at that time he had a knife in his pocket which he pulled out, and he forced her into an alley. He said that in the alley he raped her. After he raped her he stood up. When he stood up he looked back at her. He said that she looked so scared that he then killed her. I asked him how he killed her, and he said that he strangled her with his hands

Q. Do you recall any further conversation about what happened that day? A. He said that he left the area, went to the store, purchased some cigarettes, went home, and went to bed.

Q. Can you describe Marshall Murphy's emotional state as you viewed him that date when he was telling you this? A. It wasn't until later on in our conversation when Marshall began crying. Otherwise, during that period of time when he was discussing the rape and murder incident with me, he appeared to be calm.

Q. Did he state to you during that conversation how he [16] felt about that event? A. Yes. He said that he felt he had committed the ultimate sin.

Q. At the time that Marshall Murphy came to your office that day, September 28 of '81, before you got into the conversation you have just discussed, did you tell him what you wanted to talk to him about? A. Yes, I did.

Q. Was he aware of what you wanted to talk to him about? A. Yes, he was.

Q. Did he ever refuse to answer any of your questions?

A. No, he didn't.

Mr. Lynn: I have nothing further, Your Honor.

The Court. Mr. Wernick?
(Defendant's Exhibits 1 and 2 marked for identification.)

CROSS-EXAMINATION

By Mr. Wernick:

Q. Miss Widseth, I am showing you a one-page document marked for identification as defendant's exhibit 1. Can you identify what that is? A. Yes, that is the defendant's formal probation [17] order.

Q. That is an order signed by Judge Durda, and it lists the conditions of his probation? A. Yes, that's correct.

Q. And then showing you a document marked for identification as defendant's exhibit 2, can you identify what that is? A. That is the defendant's temporary probation order.

Q. And that is a document signed by Marshall Murphy? A. Correct.

Q. And this document also sets forth the conditions of Marshall's probation? A. That's correct

Mr. Wernick· Your Honor, I will offer defendant's exhibits 1 and 2.

Mr. Lynn: Ask just one question, Your Honor?

The Court: Certainly.

Mr. Lynn· Miss Widseth, these two documents marked as defense exhibits 1 and 2, are they the only two documents setting out the conditions of probation that were shown to Marshall Murphy?

The Witness: Yes, that's correct.

Mr. Lynn: No objection

The Court: Received.

By Mr. Wernick:

[18] Q. Ms. Widseth, on the document that you have which is signed by Marshall, exhibit 2, that document—I am looking in the second paragraph—describes your job as the official representative of the court. Is that true? A. Yes.

Q. And then it tells him that he is ordered to obey the conditions that are set forth. A. That's correct.

Q. And one of those conditions is be truthful to your probation officer in all matters, is that true?

A. That's correct.

Q. And another condition is to report to his probation officer as directed by you. A. That's correct.

Q. If Mr. Murphy would fail to abide by these conditions, that would be grounds for you to seek an arrest and detention order from Judge Durda, is that true?

A. That's correct.

Q. Were you present at the sentencing, at Marshall Murphy's sentencing, on the false imprisonment charge?

A. No, I was not.

Q. Now, up to the time that Mr. Murphy saw you in July, he would call you on the phone on his own initiative and make an appointment to see you, is that true?

A. That's correct, for the most part.

[19] (Defendant's Exhibit 3 marked for identification.)

By Mr. Wernick:

Q. Showing you a one-page document marked for identification as defendant's Exhibit 3, can you identify what that is? A. It is a letter I wrote to Marshall on July 14, 1981, requesting him to contact me immediately.

Q. And that is the letter which you wrote as a result of receiving information about his attendance at Alpha House? A. That's correct.

Mr. Wernick: I would offer defendant's Exhibit 3.

Mr. Lynn: No objection, Your Honor.

The Court: All right.

By Mr Wernick:

Q. In that letter you informed Mr. Murphy that failure to respond to the letter will result in an immediate request for a warrant. Is that true? A. That's true

Q. To the best of your recollection, Ms. Widseth, is that the first time that you had written Mr. Murphy such a letter to have him come talk to you? A. I also wrote a letter on September 24 asking him to contact me.

Q. Okay. Is the July letter the first letter that [20] you had written? A. Yes.

Q. Now, at the meeting you had with Mr. Murphy in July in response to that letter, did Mr. Murphy tell you that he did not want to do further treatment? A. That's correct

Q. And the result was that you told him you would not violate his probation because he seemed to be doing okay generally? A. That's right.

Q. Now, at that point you still had the authority to change your mind and order more treatment if further information came to you as you thought it warranted treatment. A. That would be questionable.

Q. When you saw Mr. Murphy on September 11, was that a meeting that he set up on his own? A Yes, it was

Q. Let me ask you this, Ms. Widseth: On October 2 of 1981, did you cause an arrest and detention warrant to be issued against Mr. Murphy? A. That's correct.

Q. And one of the allegations that you have as grounds for this arrest and detention warrant is that although defendant pursued treatment at Alpha House, he was terminated [21] for failure to actively work on a problem area and to comply with the terms of the group. Was that the grounds for the arrest and detention warrant that you alleged? A. Yes.

(Defendant's Exhibit 4 marked for identification.)

By Mr. Wernick.

Q. Showing you another one page document marked for identification as defendant's Exhibit 4, will you identify what that is? A. That is a letter I wrote to Marshall Murphy on September 24, 1981, requesting him to contact me upon his receipt of the letter.

Q. And is this the letter you wrote in response to the information you had received that you described earlier?

A. Yes.

Mr. Wernick: I will offer defendant's Exhibit 4.

Mr. Lynn: No objection, Your Honor.

The Court: Received.

By Mr. Wernick:

Q. Ms. Widseth, you testified earlier that you had received some information about what Marshall had been saying, is that true? A. Yes.

Q. That was on September 22, 1981, that you [22] received that information? A. Yes.

Q. Now, at the time you were told about that information, were you also told that Mr. Murphy was not arrested for lack of evidence? A. Yes.

Q. On September 24, did you go to your supervisor and have the discussion with him about what you should do with this information? A. Yes.

Q. Did your supervisor tell you and did you decide that you were obligated to report this information to the police? A. That's correct.

Q. Did you also decide on that date that you would be informing Marshall of this decision? A. Yes.

Q. On September 28 then, that is the day you talked with Marshall in your office, correct? A. Correct.

Q. Prior to Marshall making this statement about the murder, you told him the substance of the information you had received. A. Yes, that's correct.

Q. Did you also tell him that although you had [23] previously allowed him to continue on probation without treatment, that you now strongly felt he needed further treatment? A. That's correct.

Q. Would it be fair to say that Marshall's response was at that time that he became angry with you?

A. That's right.

Q. Did he tell you that he felt like calling an attorney?

A. Yes, that's correct.

Q. And when Marshall told you that he felt like calling an attorney, your response was that he would have to do that outside of the office, is that true? A. That he would have to deal with it outside of the office, that's correct.

Q. You told him that he would have to deal with it outside the office because your main concern at this time was another issue, the fact being that there was two related incidents. Is that what you said? A. Yes, that's correct.

Q. The subject of your conversation with Mr. Murphy from your point of view, from what you told Mr. Murphy rather, was that you thought it was necessary to talk about

whether he needed more treatment. Is that a fair statement? [24] A. That's correct.

Q. Now, before Mr. Murphy—

Mr. Lynn: Your Honor, may I have a moment?

The Court: Take a moment, certainly, go ahead.

(Discussion off the record.)

The Court: We will take a five-minute recess, and then when the attorneys are free I will see them in chambers.

(Recess.)

The Court: Go ahead, Mr. Wernick. Sorry for the interruption.

By Mr. Wernick:

Q. Ms. Widseth, before Mr. Murphy started talking about the murder case, he first talked to you about the false inprisonment case, is that true? A. That's correct.

Q. And before that you had told him that you thought these two incidences were related. A. That's right.

Q. And you also testified that he told you essentially that he was innocent of that charge, the false imprisonment. A. Yes.

Q. Did you believe him when he said that? A. No, I did not.

Q. And did you confront him about that?

[25] A. Yes, I did.

Q. Did Marshall persist with his innocence after you had confronted him about that? A. Yes, he did.

Q. Now, was your reason—strike that. When I use the term confront, you asked him questions about it, is that true? A. About the false imprisonment charge, yes.

Q. And then it was—well, let me ask you, Mrs. Wid-

seth, what does it mean to confront someone when you are counseling him? A. What does it mean?

Q. Yes, when you say confront. A. I reviewed the—as Marshall and I were sitting there, I reviewed the factual information regarding the offense and the presentence investigation and the police report. And I asked him about specific incidences that were reported by the victim and statements that he had given regarding the offense.

Q. You were trying to show the inconsistencies in his story. Would that be a fair statement? A. Not in his story; in his story as compared to the victim's.

Q. Would it be fair to say that you were pushing him on that point, whether or not he was innocent?

[26] A. That's correct.

Q. And it was after that that he started talking about this murder case, is that true? A. Yes.

Q. And it was after he talked about the murder case that you first told him that you thought it was your obligation to go to the police. Is that true? A. That's correct.

Q. At that time did you encourage Marshall to turn himself in to the police? A. Yes, I did.

Q. And Marshall said he didn't want to do that. Is that true? A. No.

Q. Did Marshall tell you he wanted time to think about whether or not he wanted to do that? A. That's correct.

Q. And you gave him permission to think about that.

A. Yes.

Q. Did Marshall at that time tell you that he knows you must really care about him because you were giving him permission to think about it as opposed to just turning him in right then and there? A. No. That's not correct.

Q. Well, did he say to you—let me rephrase it—[27] that he thought you must really care about him to have him come in and talk about this because you could have just picked up the phone and started dialing the police? A. That's correct.

Q. How long after your interview with Mr. Murphy did he finally leave your office? A. After my interview with him?

Q. Yes. A. Immediately.

Q. Mr. Murphy's condition at the end now when you are talking about this is that he was crying, is that right?

A. That's right.

Q. He had lost his composure? A. That's correct.

Q. Isn't it true that Mr. Murphy had to stay at your office for a period of a few minutes to compose himself before he left? A. I would say approximately five minutes while we continued to talk, yes.

Mr. Wernick: Nothing further.

Redirect Examination

By Mr. Lynn:

Q. Ms. Widseth, again on the 28th of September the interview with Marshall Murphy was in your office, correct? [28] A. Correct.

Q. Was the door to that office locked? A. No, it wasn't.

Q. Did you have any sort of restraint on Marshall Murphy of any kind? A. No.

Mr. Wernick: Objection, legal conclusion.

The Court: Well, I guess I don't know what restraint means there either.

By Mr. Lynn:

Q. Was he handcuffed in any way? A. No, he wasn't.

Q. Was he free to leave if he chose to get up and walk out?

Mr. Wernick: Objection, legal conclusion.

The Court: Well, in your opinion.

By Mr. Lynn:

Q. Was he free to get up and leave if he chose to?

A. Yes, he was.

Q. There were just the two of you present during that conversation? A. Correct.

Q. Now, you indicated that the first part of your conversation or much of it had to do with this false imprisonment charge. [29] A. Yes.

Q. At some point you told Marshall Murphy that you were obligated to go to the police about the rape-murder situation. A. Right.

Q. Was that before or after he told you the details of that offense? A. I believe it was after.

Q. You indicated that—back up again. Before you talked to Marshall Murphy on that date, had you had any contact with any police officer about the Sherrie Cole case, the rape-murder case? A. No, I had not.

Q. Did you have any of the police reports or files or autopsy or anything about that case? A. No, I hadn't.

Q. You indicated that at one point Marshall Murphy made mention of he ought to see a lawyer? A. Yes.

Q. Am I correct that that was in the context—

Mr. Wernick: Objection, leading.

The Court: Well, it sounded like it would have been, but I guess we won't know unless he asks it. Well, go ahead and ask it.

By Mr Lynn:

[30] Q. Was that in the context of a civil lawsuit?

Mr. Wernick: Well, objection, leading and a legal conclusion.

The Court: Well, I don't have the whole question before me.

Mr. Lynn: I will rephrase it, Your Honor.

By Mr. Lynn:

Q. You indicated that Marshall Murphy became angry, correct? A. Correct.

Q. He said something about a lawyer, is that correct?

A. That's correct.

Q. Do you recall specifically what he said? A. Yes, he said that he was so angry that the information about his admission to the rape and murder had been given to me that he felt like calling a lawyer. He felt that that violated his confidentiality.

Q. You also indicated that towards the end of the conversation you encouraged Marshall Murphy to turn himself in. A. That's correct.

Q. Do you recall what his response to that was? You indicated he wanted some time, correct? A. That's right.

[31] Q. Do you recall what you told him at that point? A. I told him that it was my legal responsibility to report the information to the police regardless of his decision, whether or not he would turn himself in

Q. Did he say anything about that back to you?

A. Yes. He did say to me that he understood that I would need to do that, and that's when he also went into his statement about he felt I really cared about him because he knows I could have just picked up the phone and dialed the police.

Q. Do you recall any conversation about whether or not he would talk to the police himself? A. No.

Q. Do you recall—or did you prepare some, at the time of these conversations, some handwritten notes?

A. Yes, I did.

Q. Did you bring those with you today? A. Yes.

Q. Let me call your attention to the fourth page of those notes towards the very end, three or four lines up, were those notes prepared at the time or shortly after the time that you talked to Marshall Murphy about this?

A. The following day.

Q. Were they accurate as best you recall as to what was said between the two of you? [32] A. Yes.

Q. Would it refresh your recollection if you could review the notes regarding my question? And I will ask you to read the last six or eight lines of your notes.

A. Yes.

Q. Do you recall how he responded now?

A. When I told him it would be my legal responsibility to report the matter to the police, he said that he understood that but that it would just be my word if he didn't confess to the police. Was that right? And I told him that to the best of my knowledge that would be correct.

Q. Calling your attention to defendant's Exhibit 4, your letter of September 24 of 1981, did that letter contain any threat to seek a warrant if Mr. Murphy did not come to your office?

The Court: Well, those letters speak for themselves. I need no further testimony on that point.

Mr. Lynn: Nothing further.

The Court: Any further testimony of this witness?

Mr. Wernick: Yes, Your Honor, a couple.

The Court: Go ahead.

Recross-Examination

By Mr. Wernick:

Q. Ms. Widseth, about this question about a lawyer, in [33] your job as a probation officer you meet many people who have legal problems, I take it. Is that true? A. That's correct.

Q. And oftentimes people who have legal problems with the criminal law have other legal problems as well, whatever they may be. A. Yes.

The Court: I am sorry. I wish we could focus in here on just some questions relative to a Rasmussen hearing.

Mr. Wernick: All right.

By Mr. Wernick:

Q. Well, would you agree, Ms. Widseth, that oftentimes people who have legal problems, they don't know what the legal problems are, but they know they have legal problems?

Mr. Lynn: I guess I will object. It's irrelevant.

The Court: It's vague. I don't know what it's leading to, and—

Mr. Wernick: I will withdraw the question.

The Court: All right. This court is going to, in assigning the issues involved here, use some of its ten years experience as a trial judge in ascertaining the relationship of a probationer and a probation officer, and I would hope the two attorneys could have a small amount of confidence in the court's ability to do that. And I surely [34] don't know of any questions that are going to assist the court in that process, or as a certainty I haven't heard any yet.

Mr. Wernick: I have nothing further.

Mr. Lynn: I have nothing further, Your Honor.

The Court: All right. You can step down. Thank you. Well, I am sorry, Ms. Widseth. So that I understand this fully, when you sent for the defendant and asked to speak to him, you knew, did you not, that you were going to speak to him on the topic of information you heard about the possible rape-murder.

The Witness: Yes.

The Court: And do I understand from your testimony that you also knew in advance that you were going to pass that information on to the police?

The Witness: Yes.

The Court: Did you advise him in advance of that fact before questioning him?

The Witness: No, I did not.

The Court: Okay, Thank you. You can step down.

Gentlemen, will you approach the bench, please?

(Discussion off the record.)

The Court: All right. Does the state have any further witnesses?

Mr. Lynn: No, Your Honor.

[35] The Court: All right. It's my understanding the defense is going to proceed and call a witness, and given the hour and the fact that the defense does not wish to interrupt that testimony, and since it's about two minutes short of our normal adjournment time, we will take our adjournment for the day.

I'd ask the attorneys and the defendant to be present at 9:15 tomorrow morning. and I'd ask the jail to please have him here ready to go at 9:15, and with that we will stand adjourned until 9:15 tomorrow morning.

(Court was adjourned until 9:15 the following day.)

[36] Marshall Murphy

(January 13, 1982, 9:15 a.m.)

Mr. Wernick: Your Honor, I will call Marshall Murphy.

Marshall Murphy, called as a witness, being duly sworn, testified as follows:

Direct Examination

By Mr. Wernick:

Q. Mr. Murphy, how old are you? A. 29.

Q. Prior to being arrested on this offense, what was your occupation? A. I was a broiler chef at the Registry Hotel.

Q. How long had you been employed there?

A. Three years.

Q. Mr. Murphy, directing your attention to September 28, 1981, did you go see Mara Widseth, your probation officer, on that date? A. Yes, I did.

Q. What caused you to go see her on that date?

A. I received a letter in the mail stating that she wanted to talk to me.

Q. And what did you think would happen if you—let [37] me ask you this: what did the letter say that she wanted to talk about? A. She said—

Mr. Lynn: The letter is in evidence.

Mr. Wernick: It's preliminary—

The Court: Go ahead and answer it.

A. Talk about further treatment plans.

Q. What did you think would happen if you did not respond to that letter? A. Well, I would have been violated.

Q. When you went into the office then on September 28, what did you think you were going to be talking about?

A. Further treatment plans.

Q. What was your reaction when your probation officer told you about the information she had received that we talked about yesterday? A. I was, you know, shocked and angry.

Q. Did the subject of an attorney come up? A. I asked her if—well, I said I feel like I should have an attorney present.

Q. Why did you feel like you should have an attorney present? A. Well, the subject matter we were talking about, little flags went up in my head, and you know, I felt like I needed an attorney at the time.

[38] Q. And what was Mara's demeanor right after you said that? A. She seemed like kind of angry and frustrated.

Q. What did she say to you? A. She said we didn't have to worry about having an attorney there now. We had more important things to talk about.

Q. What was that she wanted to talk about?

A. About the case at hand.

Q. Did you feel you were free to leave at that time?

A. No, I didn't.

Q. What did you think would happen if you left at that time? A. Well, if I would have got up and walked out of the office, I would have been violated.

Q. Did you want to talk to her about further treatment at that time? A. No.

Q. What were your feelings about going to treatment at that time? A. I, you know, I have been involved with treatment for the past three years, and I was beginning to

feel like I was, you know, institutionalized after awhile—not three years, but since '77

Q. Why did you then continue to talk to her at that [39] time? A. She wanted to talk to me.

Q. What was your physical condition at that time?

A. I was tired.

Q. How long had you been up? A. About 24 hours.

Q. What time did you get to Miss Widseth's office on September 28? A. 10 a.m.

Q. What did you do the previous night? A. I worked the graveyard shift.

Q. What time did you start work? A. 10:00 o'clock.

Q. And what time did you get off work? A. 6:00 o'clock in the morning.

Q. What reason did Mrs. Widseth give you for saying that you needed more treatment? A. She was looking at the—my false imprisonment charge and the murder as being related.

Q. Which of those two incidences did you talk about first? A. The false imprisonment charge.

Q. Just briefly. what did you say about that?

A. Well, I was trying to tell her—you know, she was bringing it up, and I was trying to tell her, you know, about [40] my innocence and that, you know.

Q. What was her reaction to that? A. She was mad.

Q. How did the subject change from that to the other case, the murder case? A. She brought it up.

Q. What did she say? A. She wanted me to talk more about that.

Q. At that time did it occur to you that she was going

to go to the police with what you said? A. No, it didn't.

Q. When did you first know she was going to go to the police? A. After we were done talking about it, she mentioned that it was her obligation.

Q. What did she ask you to do? A. She was trying to convince me to turn myself in.

Q. And what was your response? A. I told her I couldn't do that.

Q. How long after you left Mrs. Widseth's office—how long after that did you contact an attorney?

A. That evening.

Q. How many attorneys did you call that evening?

A. Three.

Q. When did you next talk to Mrs. Widseth?

[41] A. Not the following day but the day after.

Q. And what did you tell her? A. I told her that my attorney advised me not to turn myself in.

Q. Mr. Murphy, at the time you started talking about this, did you know you had the right to remain silent at that time? A. No, I didn't.

Q. Did you know you had the right to consult with an attorney at that time? A. No, I didn't.

Mr. Wernick: I have nothing further.

Cross-Examination

By Mr. Lynn:

Q. Mr. Murphy, you had been dealing with Mara Widseth as your probation officer for about a year at this time, as of September of '81? A. Correct.

Q. During that time you had met with her in her office at least, what? A dozen times? A. Yeah.

Q. Plus you had spoken to her on the phone a dozen times? A. Yes.

[42] Q. How far did you go in school? A. I got a G.E.D., and I have a certificate for cook chef program.

Q. Where did you get that? A. Brooklyn Center Suburban Hennepin North Campus.

Q. The Vocational Technical School? A. Right.

Q. You were also in the military, were you not?

A. Yes, I was.

Q. What was your job there? A. I was in the combat engineers, but I was a bus driver.

Q. Now, you indicated that over that year's period of time when you would be dealing with Mrs. Widseth many of those interviews were in her office, right?

A. All of them were.

Q. All of them were? A. Except for one.

Q. Some of those interviews, did you call her and come in on your own? A. Yes.

Q. And some of those interviews were in response to a letter by her? A. Yes.

Q. You have been in trouble with the law before, [43] have you not? A. Yes, I have.

Q. You have been through the court system a couple of times, haven't you? A. Yes, I have.

Q. And you have dealt with police officers, courts, prosecutors and defense lawyers on several occasions over the past several years? A. Yes, I have.

Q. In July of last year, '81, you were terminated or at least left the Alpha House program, is that correct?

A. That's correct.

Q. And at that time you met with Mara Widseth, correct? A. Yes, I did.

Q. She did not revoke your probation based upon that, did she? A. No.

Q. She was concerned about—at that time she felt you were okay on your own? A. Yes.

Q. When you went to see her on the 28th of September, it was to discuss the subject of treatment once again, correct? A. Yes.

[44] Q. And in fact, you did discuss further treatment with Mara Widseth on that occasion, the 28th.

A. We touched on it.

Q. She expressed to you her concern between the relationship of the old case, the one involved here, and your false imprisonment case that you were on probation for? A. Yes.

Q. She told you that it was her feeling you still needed more treatment? A. Yes.

Mr. Lynn: I have nothing further, Your Honor.

Redirect Dxamination

By Mr. Wernick:

Q. Mr. Murphy, how many other probation officers have you had besides Mara Widseth? A. Two.

Q. Has anything like this ever come up in your experience with a probation officer? A. Would you clarify on that?

Q. Have you ever had a probation officer go to the police and tell them what you had been saying to her?

A. No.

Mr. Wernick: I have nothing further.

Mr. Lynn: I have nothing further, Your Honor.

[46] CERTIFICATE

I, Claudette Ask, one of the official court reporters of the Fourth Judicial District of the State of Minnesota, do hereby certify that the foregoing is a true and correct transcript of my stenotype notes taken at said time and place.

/s/ Claudette Ask
Official Court Reporter

Defendant's Exhibit 1

STAY OF EXECUTION AND PROBATION ORDER

On August 19, 1980, the above-named defendant was duly convicted of the crime [of] false imprisonment and thereafter [, on] September 22, 1980, was sentenced for commitment to the Minnesota Correction Authority, Stillwater, Minnesota, for a period not to exceed 15 months.

And the Court being of the opinion that by reason of the character of defendant and the instances of this case it will be for the best interest of defendant and the best interest of justice [that] execution of sentence be stayed for the period of three (3) years and upon the condition this order hereinafter specified.

NOW THEREFORE IT IS ORDERED that the execution of sentence for the period of three (3) years is hereby stayed and defendant is placed on probation until September 21, [1983,] and assigned to the Hennepin County Department of Court Services for supervision.

Said stay and probation are granted, however. upon the express condition that during the continuance of said stay defendant shall observe the following order, rules and regulations

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
In the event you are arrested by any law enforcement office, you shall immediately notify probation officer and report the matter.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
Pursue treatment at Aipha House.

NOTE: Any person convicted of a felony loses his civil rights, including the right to vote in this state the right to hold public office until the stay of sentence expires.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms. The Public Law 90-618, Gun Control Act of 1968

Should defendant violate any of the conditions herein specified, or should it hereafter satisfactorily appear that sentence should be enforced, said stay may at any time prior to expiration [be] revoked and sentence executed.

DATED:————————

P.O.: Mara H. Widseth (348-5269)

CHESTER DURDA
Judge of the District Court

Defendant's Exhibit 2

DEPARTMENT OF COURT SERVICES
ADULT PROBATION DIVISION

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Minneapolis, Minn. 55487 9-22-80

To Marshall D. Murphy

As permitted by law, the Court is granting you the privilege of probation in place of imprisonment or other punishment. It does so because it believes that you are able to overcome the difficulties which brought about your arrest.

The Court will be kept informed regarding your progress through your Probation Officer, who, as the official representative of the Court, will try to aid you in every possible way to justify the confidence which the Court has placed in you.

Probation is an opportunity for you to prove to the Court that you can and will conduct yourself as a good citizen, without necessity of penal confinement. For the present you are only conditionally released. If you comply with the conditions of your probation you may expect to be discharged at the expiration of the period stated. If you fail to comply with the requirements you may be returned to Court at any time for further hearing or com-

mitment. It is hoped that you will want to earn your release in the shortest possible time.

It will be necessary for you to obey strictly the following conditions:

BE TRUTHFUL to your Probation Officer in all matters.

Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.

Report to your Probation Officer as directed.

Do not leave the State of Minnesota without the consent of your Probation Officer.

Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.

Obey all local ordinances and state and national laws.

Comply strictly with any additional requirements that may be imposed by the Court and Probation Office during the term of probation.

It is unlawful for any person convicted of a felony to pursue use or receive any firearms. Title 7, Public Law 90-618, Gun Control Act of 1968.

In the event that you are arrested by any law enforcement officer you shall immediately notify your probation officer and report the matter.

If your conviction is for a felony you have lost the right to vote and hold public office until the stay of sentence expires.

You are to pursue treatment—Alpha treatment.
I have read and received a copy of the above instructions.
I have read and fully understand the above instructions.

/s/ Marshall D. Murphy

/s/ _____

Probation Officer

Defendant's Exhibit 3

DEPARTMENT OF COURT SERVICES
DISTRICT COURT PROBATION
A-1100 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

July 14, 1981

Mr. Marshall Murphy
4100 12 Avenue South
Minneapolis, Minnesota 55407

Dear Marshall:

In view of your recent Alpha House attendance difficulties, I am requesting that you contact me immediately. Failure to do so will result in an immediate request for a warrant.

Mara M. Widseth
Probation Officer
348-5269

MW/gl

Defendant's Exhibit 4

DEPARTMENT OF COURT SERVICES
DISTRICT COURT PROBATION
A-1100 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

September 24, 1981

Mr. Marshall Murphy
4140 43 Avenue South
Minneapolis, Minnesota 55406

Dear Marshall:

To further discuss a treatment plan for the remainder of your probation, I am requesting that you contact me upon your receipt of this letter to set an appointment.

Mara Widseth
Probation Officer
348-5269

MW/gl

Appendix D

APPEARANCE

DC File 79037

CA File 81-2515

The above entitled matter came duly on for hearing before the Honorable Jonathan Lebedoff, one of the Judges of the above-named Court, on September 23, 1982.

APPEARANCES:

Robert Lynn, Assistant County Attorney, appeared on behalf of the State.

Mark Wernick, Esq., appeared on behalf of the defendant.

The Defendant was present.

Claudette Ask, Reporter.

[2] Mr. Lynn: This is the matter of State of Minnesota versus Marshall Donald Murphy, District Court File 79037, County Attorney's File 81-2515. I am Robert Lynn, Assistant Hennepin County Attorney. Mr. Murphy is present with his attorney Mr. Mark Wernick. We are before this Court this morning, Your Honor, because the defendant is charged by an indictment with murder in the first degree. As the Court is aware, we had an omnibus hearing in this matter surrounding a confession. The Minnesota Supreme Court, having heard that issue as certified, the questioning of the defendant, suppressed that particular confession in a decision dated August 31 of this year. 1982.

We are back before this Court then as a continuation of that omnibus hearing which was held May 16 of '82 to determine the remaining motions and the status of Mr. Murphy.

I will inform the Court, as I have already, and counsel that the State does plan to petition for writ of certiorari to the United States Supreme Court for a review of the Minnesota Supreme Court decision in this matter. I anticipate that that process, should that petition be granted and heard, will take well over one year, probably 18 months, perhaps more. That's the time period we are dealing with before we can proceed with this case [3] any further.

The Court: All right. Of course, this case was specially assigned to this Court for trial. The Court preparatory to selecting a jury on the charge of murder in the first degree had the so-called omnibus II hearing, and at that time the Court dealt primarily with the admissibility into evidence of the alleged confession of the defendant. This Court obviously held that the confession was admissible, as already indicated by the County Attorney.

That ruling was reversed by the Minnesota Supreme Court last week and in a 7 to 2 vote they determined that the confession was inadmissible.

This case is now, I believe—well, the Supreme Court has ordered this case remanded to this Court, and we have not yet received the original file back from the Supreme Court. However, the attorneys have asked for this hearing, and I will now await any motions.

It's my understanding that there is now going to be a bail motion made.

Mr. Wernick: Yes, Your Honor, but first I think procedurally, Your Honor, I do have a motion to dismiss the indictment pending before the Court for insufficient evidence, inadmissible evidence before the grand jury. I renew the motion at this time expecting full well that

[4] the Court, if it were to grant the motion, would stay its position to allow the State to appeal, but for the record I do renew that motion.

The Court: Mr. Lynn, do you wish to respond?

Mr. Lynn: Only to say this, Your Honor: that the grand jury transcript as viewed now, taking out the suppressed confession, there is insufficient evidence at this point to proceed further with the prosecution.

The Court: All right. I appreciate the candor of the County Attorney on that point. That fact is obvious to this Court as well. The importance of the inadmissibility or admissibility of the confession is total to the prosecution of this case in this Court's view.

This Court has reviewed the motion originally raised at the omnibus hearing by Mr. Wernick, and we do feel that given the inadmissibility of the confession, that there is not remaining sufficient evidence to do other than grant Mr. Wernick's motion. Accordingly, at this time Mr. Wernick's motion to dismiss raised at omnibus hearing is granted. The granting of that motion, however, is stayed at this time pending a final determination by the United States Supreme Court.

Is there anything further?

Mr. Lynn: Only, Your Honor, that pursuant to Minnesota Rules of Criminal Procedure 17.06, all the subdivisions, [5] I already have, but I will again serve notice that we do plan to appeal this matter. The time length is such that again, it will be at least a year and a half, possibly longer, so we would ask for the stay to be in effect until there is some determination by the United States Supreme Court as to whether they are going to hear this matter or not.

The Court: Yes. I thought my order staying the granting of Mr. Wernick's motion encompassed the final determination by the United States Supreme Court. And lest there be any confusion about that, this Court will now order that this stay be in effect until further order of this Court.

Until such time as either party feels there is a determination by the United States Supreme Court, you can then petition me to vacate the stay, but until such order the stay is in effect.

Since we now have stayed this for a review of the United States Supreme Court and apparently there is no dispute about the fact there is an 18-month to two year time frame there, and since I further understand that pursuant to this matter the defendant is in a custodial setting, I would await any motions relative to bail.

Mr. Wernick: Your Honor, as the Court knows, Mr. Murphy is now on probation to Judge Durda. Mr. Murphy [6] has been incarcerated for almost one year now not only as a result of the bail on the murder charge but also as a result of an arrest and detention order from Judge Durda. Earlier this week Judge Durda quashed the arrest and detention order and told counsel that he was not revoking probation.

I am going to take no further action on that at this point, but I do want this record to reflect, because I haven't made a record on this yet, that in my view the time that Mr. Murphy spent in custody for Judge Durda does count towards that sentence if the time were to come that Judge Durda were to revoke his probation. But I am making my record on that only.

I am now not objecting to the fact that Mr. Murphy

stay on probation status, and I'd ask the Court to set bail in the amount of $5,000 in addition to any other non-monetary conditions of release that the Court deems appropriate.

The Court: Does the State wish to respond to that motion?

Mr. Lynn: Yes, Your Honor. As to Mr. Murphy's present status, Judge Durda did not revoke, and that was basically a joint request, anticipating that Mr. Murphy will be on some sort of a bail status. It was my feeling I would also like him under the supervision of [7] a probation officer at least until September of '83 when he gets off of probation to Judge Durda. Again, Your Honor, we are operating under Rule 17 of the Rules of Criminal Procedure which provide in a situation like this for the Court to set a bail or make other conditions of release pending this appeal.

Your Honor, the $5,000 figure that has been recommended, I believe, by counsel in my view, combined with a rather close supervision by the Department of Court Services as best they are able under the circumstances, is a reasonable situation, given the time period and the uncertainty of the outcome of this appeal, so I have no opposition to that at this time.

The Court: All right. Thank you, Mr. Lynn. Based on the Court's assessment of the facts and the acquiescence in the $5,000 request by the State for the reasons just stated by Mr. Lynn, this Court at this time will order that the defendant may be released pending outcome of this matter on the conditions that, first, he post bail in the amount of $5,000 and, second, that he be under what we would call close supervision of the Department of Court Services.

Mr. Barbeau is present in Court who I believe has been assigned now to be his probation officer, and, Mr. Barbeau, I would ask you to set up any form of communication [8] that you feel is consistent with this Court's order of close supervision, given the facts of this case.

Probation Officer: Yes, Your Honor.

The Court: All right. Is there anything further before us?

Mr. Lynn: I believe not, Your Honor. I will keep the Court and counsel posted on the progress of the appeal when we have completed the documents.

The Court: This is an unusual case, and I think it's fair to say that all the parties to the case recognize that a successful prosecution of this case rises or falls on the admissibility of the confession that was the question of the appeal to the Minnesota Supreme Court. This Court obviously ruled that the confession was admissible. The Supreme Court by a 7 to 2 vote took an opposite view. I am not questioning either their judgment or the process. I respect both. And I would note on the record that this Court does feel that the ultimate admissibility of the confession, for whatever final effect that might have, is a very close question of law in this Court's judgment involving public policy questions and the ultimate use of the exclusionary rule. For those reasons this Court feels, whatever the final result may be, it is quite appropriate that this matter be appealed to the United States Supreme Court so that they can have their final input on what this [9] Court considers a very fundamental and important question. Thank you.